Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271
	)	

REPLY COMMENTS OF THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

Andrew Kreig
President
1333 H Street, NW
Suite 700 West
Washington, DC 20005
(202) 452-7823

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EXECUTIVE SUMMARY

As the trade association of the wireless broadband industry, The Wireless Communications Association International, Inc. ("WCA") has a direct and immediate interest in Commission rules and policies that affect the provision of wireless broadband services. The Commission has recognized that these services will play a critical part in the fulfillment of the Nation's broadband deployment goals, and are already spurring innovation by providers of competing broadband platforms. In these reply comments, WCA underscores important points made in the initial comment round: The Commission has determined that the broadband Internet access market is competitive and becoming even more so; the forces of competition, joined with existing, generally applicable legal protections at the state and federal levels, will guard consumer interests in this market; and parties seeking expanded regulation have been unable to cite specific harms that would justify sweeping regulatory requirements of the sort contemplated by the *Notice*. As such, WCA believes that broad regulations are unnecessary, and threaten to stifle, not promote, the deployment of wireless broadband technologies.

First, WCA urges the Commission not to impose customer proprietary network information requirements on providers of broadband Internet access services. Given the state of competition in the broadband market, a provider's incentive to retain its customers, in concert with existing, generally applicable protections at the state and federal levels, will work to ensure consumer privacy. Recognizing the importance of this issue, many providers have implemented privacy policies in the absence of any regulatory mandate requiring them to do so. Moreover, consumers' needs in this area will be protected by the Federal Trade Commission ("FTC"), which has already demonstrated its commitment to individual privacy rights, and by generally applicable state statutes that bar unfair or deceptive trade practices.

Second, WCA urges the Commission to reject calls for the application of "slamming" regulation to broadband Internet access services. As the Commission suggested in the *Notice*, the factors that make slamming possible in the context of the public switched telephone network ("PSTN") are unique to that network, making slamming all but impossible in the broadband context. Whereas certain voice telephony providers are authorized to name themselves a customer's presubscribed carrier without customer confirmation, broadband providers enjoy no equivalent prerogatives. And while it is possible to change a customer's *voice* provider without that customer's knowledge, a change in *broadband* provider often requires the installation of new facilities to the customer's home, the replacement of customer premises equipment, and/or changes in passwords, log-in information, and the like. Moreover, even if slamming were feasible in relation to broadband Internet access services, consumers remain subject to the protections afforded by the FTC and generally applicable state consumer protection statutes.

Third, WCA urges the Commission not to impose onerous truth-in-billing requirements on providers of broadband Internet access services. Specific billing-related mandates would unduly constrain broadband providers and would unnecessarily divert resources to compliance efforts, regulatory advocacy and litigation. Here, too, the forces of competition, in conjunction with existing, generally applicable consumer protection mechanisms, will ensure that consumers' needs are met.

Fourth, the Commission should abstain from imposing network outage reporting requirements on providers of broadband Internet access services. Whereas communication over the circuit-switched PSTN involves a dedicated carrier stream that remains constant throughout a call, simplifying the identification of network outages, broadband networks are far more complicated. Outages experienced by an end user might stem from numerous causes, including not only failure of the broadband service provider's network, but failure in the backbone, failure in network of the Internet Service Provider serving an applications provider, or even failure of a router system used to distribute content within a home or office. Backbones, moreover, routinely exchange traffic with one another. Finally, packet routing permits a single communication to travel over multiple routes. Together, these factors tremendously complicate any effort to identify and report broadband network outages. Given providers' business incentives to ensure that their broadband networks function properly, and given generally applicable state and federal protections that are available to any consumer who suffers harm, outage reporting requirements are not warranted here.

Fifth, the Commission should resist calls for the imposition of Section 214-type discontinuance requirements in the context of broadband Internet access services. The Commission has already determined that the transmission component of a wireline broadband Internet access service should not be subject to such requirements, so long as the provider gives adequate notice of an impending discontinuance to its customers and the FCC. No party has offered any evidence suggesting that providers of broadband Internet access services should be subject to more stringent requirements. When such a provider discontinues service, its customers will generally be able to purchase service from one or more alternative providers, and the number of choices available is increasing, not decreasing. In such a market, the imposition of burdensome exit barriers is not justified.

Sixth and finally, WCA urges the Commission not to impose rate averaging requirements on broadband Internet access services. Rate averaging requirements are just another variety of the economic regulation the Commission has already rejected in the context of cable- and wireline-based Internet access services. Such requirements would distort competition and hinder the deployment of broadband services in urban and rural areas alike. Such distortion is indefensible here, particularly in light of evidence that rural areas are already enjoying significant build-out, and can expect even more competition as wireless and satellite technologies continue to mature.

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The Wireless Communications Association International, Inc. ("WCA"), hereby submits its reply to the comments filed in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

As the trade association of the wireless broadband industry, WCA has a direct and immediate interest in Commission rules and policies that affect the provision of wireless broadband services. WCA's membership includes a wide variety of wireless broadband system operators, equipment manufacturers and consultants interested in the deployment of wireless broadband service utilizing, *inter alia*, the 700 MHz, 900 MHz, 2.1 GHz, 2.3 GHz, 2.4 GHz, 2.5 GHz, 3.6 GHz, 5 GHz, 18 GHz, 24 GHz, 28 GHz, 31 GHz, 38 GHz and 70/80/90 GHz bands. The Commission has recognized that these services will play a critical part in the fulfillment of the Nation's broadband deployment goals, and are already spurring innovation by providers of competing broadband platforms.[2] WCA submits these reply comments to underscore important

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33 *et al*., Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order and Notice*," or, where applicable, "*Wireline Broadband Order*" or "*Notice*").

[2] *See, e.g., Connected & On the Go: Broadband Goes Wireless*, Report by the Wireless Broadband Access Task Force, FCC, at 1-2 (February 2005) ("*Wireless Broadband Task Force Report*") ("Wireless broadband constitutes a critical component of our nation's goal of ensuring that reliable and ubiquitous
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points made in the initial comment round: The Commission has determined that the broadband Internet access market is competitive and becoming even more so; the forces of competition, joined with existing, generally applicable legal protections at the state and federal levels, will guard consumer interests in this market; and parties seeking expanded regulation have been unable to cite specific harms that would justify sweeping regulatory requirements of the sort contemplated by the *Notice*. As such, WCA believes that broad regulations are unnecessary, and threaten to stifle, not promote, the deployment of wireless broadband technologies.

I. INTRODUCTION

In this proceeding, the Commission asks whether it should extend various consumer protection requirements found in Title II of the Communications Act (the "Act") to broadband Internet access services, most of which it has classified as "information services" not subject to the provisions found in that part of the Act.[3] It is essential to recognize, however, that the question raised here is *not* whether consumer privacy, truthful billing, and other consumer protections are important objectives; they clearly are. What is at issue here is whether, given

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broadband becomes available for all Americans."); *Wireline Broadband Order*, 20 FCC Rcd at 14884 ("Increased intermodal and intramodal competition will continue to encourage [cable and xDSL-based] broadband providers to deploy broadband Internet access services throughout their respective service areas. In addition, the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure, including more advanced infrastructure such as fiber to the home."); *see also* Comments of CTIA, WC Docket No. 05-271, at 2-3 (filed Jan. 17, 2006) (describing deployment of wireless broadband services).

[3] While the Commission has not affirmatively classified wireless broadband Internet access services of the sort provided by WCA's members as "information services," these services share the general characteristics that led the Commission to classify cable- and wireline-based Internet access services as "information services," and the Commission's Wireless Broadband Task Force has recommended that the Commission classify wireless broadband Internet access services as "information services" as well. *See Wireless Broadband Task Force Report* at 68-70. For purposes of these reply comments, where relevant, WCA assumes that the broadband Internet access services its members provide will be classified as "information services."

competition in the provision of broadband Internet access services, such objectives should be pursued via broad *ex ante* regulations of the sort that too often distort economic incentives, or via the same means that typically govern unregulated competitive sectors – namely, market forces and generally applicable *ex post* consumer protection mechanisms. The record compiled thus far points strongly in the latter direction. In almost all markets, consumer interests are protected by a combination of providers' own incentives to meet customer needs and generally applicable laws establishing punishments for unfair or deceptive business practices. The Commission has already recognized that competition in the market for broadband Internet access undermines the rationale for extensive economic regulation. Now it should recognize that this competition also eviscerates the justification for other regulations where – as here – market mechanisms and *ex post* consumer protection requirements will ensure that consumers' interests are met.

Commenters in this proceeding overwhelmingly agree on five fundamental, interrelated points that weigh heavily against the imposition of broad regulatory requirements in this matter. First, the market for broadband Internet access services is competitive, and is becoming more so as some providers continue to expand traditional broadband technologies, while others deploy innovative terrestrial wireless, satellite, fiber-to-the-home, and even broadband over power line systems.[4] Second, competition will itself impel providers to respond to customers' desires, lest those customers defect to alternative providers.[5] Third, consistent with the preceding points,

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[4] *See Wireline Broadband Order*, 20 FCC Rcd at 14879-87; *see also infra* note 14.

[5] *See* Comments of the Telecommunications Industry Association, WC Docket No. 05-271 *et al.*, at 2 (filed Jan. 17, 2006); Comments of the National Cable & Telecommunications Association, WC Docket No. 05-271, at 5 (filed Jan. 17, 2006) ("NCTA Comments"); Comments of Verizon, WC Docket No. 05-281, at 5 (filed Jan. 17, 2006) ("Verizon Comments") ("The need to attract and retain customers who have other options provides strong incentives for broadband companies to protect consumers and *not* to, for
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customers have not in fact suffered the kind of harms feared by the *Notice*;[6] even those parties advocating increased regulation are unable to cite specific instances where rules such as those at issue here were necessary. Fourth, absent evidence of actual harm, it would be inappropriate to impose broad prophylactic consumer protection regulations, which are likely to distort competition.[7] Fifth and finally, even if actual harm were to arise, there exist adequate, generally applicable remedies at both the state and federal levels which obviate the need for broad, market-altering regulation.[8] In short, competition in the market for broadband services is robust, and such competition eliminates the rationale for extensive *ex ante* regulation. "A new layer of consumer protection laws, drawn from rules for telecommunications services in a monopoly era, is not required in the competitive broadband Internet access marketplace."[9] Rather, where necessary, this market should be policed just as other competitive markets are policed: Via the generally applicable enforcement mechanisms already found in state and federal law.

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instance, misuse customer proprietary network information, or be untruthful in billing, or permit undue network outages.").

[6] *See* Comments of Cingular Wireless LLC, WC Docket No. 05-271, at 6 (filed Jan. 17, 2006) ("Cingular Comments"); Comments of the United States Telecom Association, WC Docket No. 05-271, at 4 (filed Jan. 17, 2006) ("USTA Comments") ("[T]here is no significant evidence, if any at all, that consumers are having problems with their broadband services that would warrant imposition of regulations protecting them.").

[7] *See* Cingular Comments at 11 ("[U]ndue regulation may discourage the provision of broadband Internet access from alternative sources such as CMRS, resulting in fewer choices for consumers, less innovation, and ultimately, perhaps, a need for more regulation."); NCTA Comments at 13 ("As a general matter, unless a problem is evident, regulators should stand aside."); Verizon Comments at 5 ("New regulations inevitably increase costs while discouraging experimentation and innovation.").

[8] *See* NCTA Comments at 11; USTA Comments at 5; Comments of BellSouth Corporation, WC Docket No. 05-271, at 4-5, 8-9 (filed Jan. 17, 2006) ("BellSouth Comments"); Verizon Comments at 12; Comments of AT&T, Inc., WC Docket No. 05-271, at 9 (filed Jan. 17, 2006) ("AT&T Comments").

[9] NCTA Comments at 13.

II. DISCUSSION

For the reasons discussed below, WCA agrees with commenters who oppose the extension of regulatory requirements involving customer proprietary network information ("CPNI"), slamming, truth-in-billing, network outage reporting, discontinuance of service, and rate averaging to broadband Internet access providers.[10] As the Commission explained in the *Wireline Broadband Order*, "many consumers have a competitive choice for broadband Internet access services today,"[11] and a "wide variety of competitive and potentially competitive providers and offerings are emerging,"[12] leading to "increasing competition at the retail level for broadband Internet access service."[13] The comments further confirm the competitive state of the broadband Internet access market.[14] In light of this competition, consumers' needs can be met

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[10] WCA takes no position here regarding the Commission's authority to apply the regulations described in the *Notice* – all found in Title II – to "information services" such as the broadband Internet access services at issue here. In these reply comments, WCA assumes *arguendo* that the Commission does possess such authority, and addresses only the merit of applying the regulations to broadband providers.

[11] *Wireline Broadband Order*, 20 FCC Rcd at 14879.

[12] *Id.* at 14880-81.

[13] *Id.* Moreover, while broadband is not ubiquitously available at present, the Commission determined that "an emerging market, like the one for broadband Internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve." *Id.*

[14] *See, e.g.*, Verizon Comments at 3-4 ("Cable broadband is now available to approximately 93% of homes passed by cable, and DSL is available to approximately 82% of homes served by the Bell companies. Satellite broadband service is available throughout the United States through [multiple providers]. As of September 2005, approximately 2.7 million homes in North America were passed by fiber-to-the-home – an increase of more than 175% from the 970,000 homes that were passed a year earlier – and that number will continue to increase rapidly. The Commission's statistics indicate that in December 2004 … two or more competing providers were providing service in 83% of all ZIP codes. Since that time, broadband investment has continued apace. By way of example, in mid-2005, Google joined Goldman Sachs and the Hearst Corporation to make a combined $100 million investment in Current Communications Group for the deployment of broadband over power lines. And recent press reports indicate that DirecTV may spend as much as $1 billion on a new national wireless broadband strategy.") (citations omitted). *See also* BellSouth Comments at 5-6; Comments of Comcast Corporation, WC Docket No. 05-271, at 12 (filed Jan. 17, 2006) ("Comcast Comments"); Cingular Comments at 6.

without broad prophylactic regulation, and such requirements will only undermine the flexibility and dynamism that has thus far characterized the expansion of the broadband marketplace.

A. The Commission Should Not Impose CPNI Requirements on Broadband Internet Access Services.

As many commenters have explained, the competitiveness of the broadband Internet access market critically undermines any argument favoring rule-based privacy requirements. Such requirements simply are not well suited for markets where customers are able to choose among multiple providers. In these markets – including the market for broadband Internet access – providers will compete along a number of dimensions, including not only the price and speed of service, but also the satisfaction of customer interests such as the protection of personal information.[15] Thus, as several commenters note, the market for the broadband Internet services is likely to protect the privacy interests of consumers.[16] In fact, it appears that the market is functioning well in this regard. The record indicates that privacy violations by broadband Internet access providers have not become a problem.[17] In circumstances such as these, the

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[15] Indeed, in some cases, customers might choose to "sell" their privacy rights, permitting the revelation of certain information in return for a reduced price. *See, e.g.*, Comments of Time Warner, Inc., WC Docket No. 05-271, at 8 (filed Jan. 17, 2006) ("Time Warner Comments") ("In fact, some ISPs compete on the basis of their privacy policies, and experience has shown that ISPs that fail to protect their customers' privacy risk incurring their wrath and driving them to an alternative provider that takes privacy more seriously.").

[16] *See, e.g.*, USTA Comments at 4-5; NCTA Comments at 5; Time Warner Comments at 7.

[17] *See, e.g.*, AT&T Comments at 11 (noting that a privacy problem "has not been shown to exist"); Time Warner Comments at 8 (citing "absence of concrete evidence of significant harm to consumers"). Notably, even those parties that support the imposition of privacy requirements cannot cite any disclosures committed by providers of broadband Internet access. The New Jersey Ratepayer Advocate cites identity theft issues generally, but does not indicate why broadband providers are any more responsible for this problem than providers in any other business, or why those providers should be subject to regulation more extensive than that faced by those other businesses. *See, e.g.,* Comments of the New Jersey Division of the Ratepayer Advocate, WC Docket No. 05-271, at 8-10 (filed Jan. 17, 2006) ("New Jersey Ratepayer Advocate Comments").

Commission should maintain its policy against the application of CPNI requirements to providers of information services.[18]

This is not to say that the market is the only safeguard against improper treatment of customers' personal information. As numerous parties have explained, there exist a host of protections, both public and private, that will maintain customers' privacy here.[19] First, to the extent the Commission has classified broadband Internet access services "information services" rather than "telecommunications services," entities providing such services are not "common carriers," and are thus subject to the jurisdiction of the Federal Trade Commission ("FTC").[20] Federal law directs the FTC to prevent "unfair or deceptive acts or practices in or affecting commerce,"[21] and the agency has made the protection of consumer privacy a central priority.[22] As Verizon explains, the FTC has vigilantly guarded individual privacy interests, bringing actions against numerous entities in diverse industries.[23] In addition, consumers are protected by state laws of general applicability prohibiting unfair or deceptive trade practices.[24] Finally,

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[18] *See Wireline Broadband Order*, 20 FCC Rcd at 14930-31; Verizon Comments at 9-10.

[19] *See, e.g.*, USTA Comments at 5 ("Broadband consumers whose privacy is violated can look to the Federal Trade Commission, state consumer advocates, and state attorneys general to bring a complaint against the violating provider.").

[20] *See* 15 U.S.C. § 45(a) (describing extent of FTC jurisdiction). *See also* AT&T Comments at 9; Verizon Comments at 12; Comcast Comments at 13 n.34.

[21] 15 U.S.C. § 45(a).

[22] *See* FTC, Privacy Initiatives, *at* http://www.ftc.gov/privacy/ ("Privacy is a central element of the FTC's consumer protection mission.").

[23] *See* Verizon Comments at 12 (citing FTC web site describing privacy-related enforcement actions); Federal Trade Commission, Privacy Initiatives, Unfairness & Deception, *at* http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html).

[24] *See* Verizon Comments at 16; BellSouth Comments at 9; AT&T Comments at 9-10.

individual entities and industry groups are increasingly adopting self-enforced privacy policies to further protect consumers.[25]

In short, market mechanisms and existing legal protections will be sufficient to safeguard consumer information obtained in the provision of broadband Internet access services. Especially given the absence of evidence regarding actual breaches of consumer privacy in this area, the Commission should reject calls for preemptive regulation.[26]

B. "Slamming" Regulations Should Not Be Imposed On Broadband Internet Access Services.

The Commission should also reject arguments favoring the imposition of "slamming" regulation in the context of broadband Internet access.[27] As a threshold matter, the arguments raised above with regard to CPNI apply in equal force here. Competition, in conjunction with

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[25] *See, e.g.*, USTA Comments at 5; BellSouth Comments at 16; Verizon Comments at 10-11; AT&T Comments at 11-12. The National Association of State Utility Consumer Advocates ("NASUCA") alleges that these policies are "full of loopholes and exceptions [and] generally are unenforceable by a consumer." Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 05-271, at 24-25 (filed Jan. 17, 2006) ("NASUCA Comments"). NASUCA provides no specific examples, however, of such a policy. Similarly, NASUCA asserts that potential consumers cannot rely on privacy policies to choose among providers, but provides no explanation as to why that would be true. *See id.* at 29.

[26] A minority of commenting parties support regulation. These parties, however, simply assert a purported need for regulation, and nowhere explain why market forces and existing legal protections will be insufficient. *See id*. at 24-29; Comments of the National Consumer Law Center *et al*., WC Docket No. 05-271, at 6 (filed Jan. 17, 2006) ("National Consumer Law Center Comments"); Comments of AARP, WC Docket No. 05-271, at 4 (filed Jan. 17, 2006) ("AARP Comments"); Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 05-271, at 11-12 (filed Jan. 17, 2006) ("NARUC Comments"); Comments of the Public Utilities Commission of Ohio, WC Docket No. 05-271, at 8-9 (filed Jan. 17, 2006) ("PUCO Comments"). However in a competitive market, the presumption should be against regulation, and mere assertions that regulation is necessary in the broadband context simply because it was necessary in the context of narrowband telephony must be rejected.

[27] *See generally* 47 U.S.C. § 258 (stating that "[n]o telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe" and providing for liability in case of violation).

FTC enforcement and state consumer protection mechanisms, will guard against the kind of abuse envisioned in the *Notice*. But in the slamming context, there is another critical reason to eschew invasive regulation. As the record makes clear, the factors that make slamming possible in the public switched telephone network are unique to that network, making slamming all but impossible in the broadband context.

In the *Notice*, the Commission expressed its uncertainty as to "whether, given the manner in which broadband Internet access service is provisioned, slamming could actually occur from a technical perspective."[28] The comments received have confirmed the Commission's doubt. As the comments make clear, the concerns that led to slamming protections in the analog voice world are inapplicable in the broadband world, for two principal reasons: (1) the historical circumstances that permitted a provider to name itself a subscriber's carrier without consent in the analog voice world do not obtain in the broadband market, and (2) the hardware and software changes associated with the migration to another broadband provider render it nearly impossible to change a subscriber's carrier without the subscriber noticing.

First, the historical circumstances that allowed an interexchange carrier ("IXC") to name itself a subscriber's long-distance provider – and that thus gave rise to the first slamming rules – simply are not relevant in the broadband context. As BellSouth explains, the Modification of Final Judgment ("MFJ") that set forth the terms of the AT&T divestiture sought to ensure that IXCs other than AT&T would be able to provide service to customers of the Regional Bell Operating Companies. In doing so, the MFJ established open access obligations pursuant to which a subscriber could designate a preferred carrier to which his or her interexchange traffic

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[28] *Notice*, 20 FCC Rcd at 14932 n.453.

would automatically be routed. Under this regime, however, the IXC itself acted as the customer's agent, and when a customer switched from one IXC to another, the task of informing the customer's local exchange carrier ("LEC") of the change fell to the second IXC. This regime, of course, was subject to abuse, because IXCs had incentive to assume other IXCs' customers, and an untrustworthy IXC could misinform the LEC, prompting a change in service that was *not* requested by the customer.[29] This potential for abuse gave rise to the slamming rules, even before Congress codified anti-slamming requirements in the 1996 Act.[30] But the potential for such abuse is absent here: To WCA's knowledge, there is no case in which a broadband provider is empowered to inform a third party that it has assumed responsibility for a given customer without that customer's express involvement and consent.

Second – and even more fundamentally – the record reveals nearly unanimous agreement that broadband "slamming" is, as a technical matter, all but impossible. The public switched telephone network relies on a single architecture and a uniform interface with the end user's customer premises equipment ("CPE"), permitting changes in the provider's identity that are undetectable by the user. In contrast, broadband connections rely on several different platforms, each of which requires the use of different CPE. Thus, as Verizon argues:

> *Intermodal* slamming is all but impossible: if a customer has chosen wireline broadband Internet access, then there is no practical way to switch that customer between DSL, fiber, cable modem or satellite Internet access

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[29] *See generally* BellSouth Comments at 10-13.

[30] *See Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995); *Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Notice of Proposed Rulemaking, 9 FCC Rcd 6885 (1994); 47 U.S.C. § 258.

> providers without the customer's knowledge. The necessary changes to network connections and CPE make that impracticable.[31]

Moreover, even undetected migration between two providers using the same platform is highly unlikely:

> With regard to *intramodal* slamming at the level of the information service, while it may be technically feasible, it, too, if often impractical because of the need … to change passwords, email and log-on information.[32]

In fact, virtually all facilities-based providers that filed comments here remarked on the unlikelihood that slamming would be technically feasible.[33]

In short, broadband providers are not empowered to change customers' subscription choices without their consent in the broadband world, and even if they were, they could not do so without those customers knowing. In both of these respects, the broadband network is materially different from the one-wire analog network that gave rise to the Commission's slamming rules. For this reason (and in light of the protections also afforded by competitive market forces, the FTC enforcement process, and state consumer protection mechanisms), the Commission should resist any temptation to extend its "slamming" rules in the manner contemplated by the *Notice*.[34]

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[31] Verizon Comments at 14.

[32] *Id.*

[33] *See* AT&T Comments at 8; BellSouth Comments at 12-13; USTA Comments at 5-6; Comcast Comments at 15; NCTA Comments at 14; Time Warner Comments at 8-9.

[34] Several parties seek the imposition of slamming requirements on broadband Internet access. *See* NASUCA Comments at 31; National Consumer Law Center Comments at 8-9; NARUC Comments at 12-13; PUCO Comments at 9-10; New Jersey Ratepayer Advocate Comments at 10-11. However, these commenters uniformly fail to indicate how slamming would be possible in the broadband environment. Two of these commenters – the Public Utilities Commission of Ohio ("PUCO") and the National Association of Regulatory Utility Commissioners ("NARUC") – suggest that slamming would be *easier* in the broadband world than in the analog telephony worlds. On inspection, however, it becomes clear that both are referring to unauthorized changes of a customer's non-facilities-based Voice over Internet Protocol ("VoIP") service (a topic under consideration in the *Commission's IP-Enabled Services* docket, *see IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863,
(continued on next page)

C. Application Of Truth-in-Billing Requirements To Broadband Internet Access Services Is Unnecessary.

Nor is there reason to impose onerous truth-in-billing requirements on broadband service providers. As many commenters have pointed out, the same market forces that have prompted the Commission to relieve certain broadband Internet access services from strict economic regulation will also ensure that providers strive to provide their customers with truthful, easily understood bills.[35] And while the Commission cites billing complaints relating to the provision of broadband Internet access, it is not clear that the problems are sufficiently severe or pervasive to justify onerous, broad-based regulation.[36]

Given that competitive forces can be expected to discipline billing practices in the broadband market – just as they have done in myriad other industries not subject to pervasive regulation – the imposition of strict truth-in-billing requirements is likely to do far more harm than good. The Commission has emphasized the importance of according flexibility to the

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4910-11 (2004)), rather than to changes in the customer's broadband Internet access provider (the topic under consideration in this proceeding).

[35] *See* Comcast Comments at 15 ("Comcast and other providers have every incentive to ensure that their customers' bills are easy to read and are accurate."); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, WC Docket No. 05-271, at 5 (filed Jan. 17, 2006) ("OPASTCO Comments") ("The competitive nature of the market for broadband Internet access services incents rural carriers to provide their customers with bills that are clear, non-misleading, and in plain language."); Time Warner Comments at 9; BellSouth Comments at 19-20. The National Consumer Law Center asserts that "[t]he marketplace has little incentive to ensure better billing practices" and NASUCA states that market forces will not curtail unfair billing practices, but neither provides any support or explanation for its claim. *See* National Consumer Law Center Comments at 9; NASUCA Comments at 32.

[36] *See* NCTA Comments at 13 ("The lack of complaints over billing practices strongly suggests that market forces are imposing the necessary discipline on providers."); Comments of Qwest Communications International Inc., WC Docket No. 05-271, at 3 (filed Jan. 17, 2006) ("Qwest Comments") (stating that there has been "no demonstration that the market has failed with regard to a wide variety of issues," including customer billing).

providers of broadband services and the applications that ride over those services.[37] Specific billing-related mandates would undermine that very flexibility, requiring costly changes in existing billing practices and limiting a provider's ability to structure its offerings in the manner most consistent with customer preferences.[38] Further, as Time Warner points out, because terms such as "clear" and "non-misleading" are inherently subjective, such requirements would undoubtedly give rise to further regulatory squabbles, and even litigation, forcing providers to divert resources that might otherwise be dedicated to research and development.[39]

As above, opposition to regulatory requirements does *not* indicate opposition to truthful billing practices. Rather, existing enforcement mechanisms, of the type generally relied on in competitive markets such as that for broadband service, are sufficient to remedy potential abuses. First, to the extent the Commission has classified broadband Internet access services "information services," the FTC has jurisdiction to pursue remedies for unfair billing practices associated with the provision of such services.[40] Second, generally applicable state consumer protection laws prohibiting deceptive or unfair trade practices will also serve to protect against

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[37] *See, e.g.*, *Wireline Broadband Order*, 20 FCC Rcd at 14895 (citing providers' need for "flexibility to respond more rapidly and effectively to new consumer demands" as a central rationale for removing *Computer Inquiry* network sharing requirements); *id.* at 14877-78 (explaining that "regulation can have a significant impact on the ability of wireline platform providers to develop and deploy innovative broadband capabilities that respond to market demands" and that this "negative impact on deployment and innovation [was] particularly troubling in view of Congress' clear and express policy goal of ensuring broadband deployment, and its directive that [the Commission] remove barriers to that deployment").

[38] *See* OPASTCO Comments at 5 (explaining that "imposing formal truth-in-billing rules on rural ILEC providers of broadband Internet access services may require them to modify their billing systems"); Time Warner Comments at 10.

[39] Time Warner Comments at 10; *see also* OPASTCO Comments at 6 (noting that billing system modifications "would undoubtedly divert resources that otherwise would be devoted to the provision of advanced services to rural customers and extending the reach of these services to additional consumers").

[40] *See supra* note 20.

possible abuses.[41] Thus, the Commission should reject calls to impose truth-in-billing requirements on the provision of broadband Internet access service.[42]

D. The Commission Should Not Require Network Outage Reporting By Broadband Internet Access Services.

The comments also make clear that network outage reporting requirements, however sensible in the context of wireline analog networks, would be particularly burdensome – and particularly unhelpful – in the context of wireless digital broadband networks.

As many commenters explain, the nature of next-generation networks – and especially of the Internet – render network outage reporting far more complex than it is in the analog wireline world. As the National Cable & Telecommunications Association notes: "A failure of circuit-switched traffic will reside in the circuit-switched network; the same cannot always be said for a broadband connection."[43] In the circuit-switched analog world, a carrier stream follows a single linear path over facilities generally owned by a small set of pre-selected carriers. Thus, for example, a typical long-distance call involves the calling party's LEC, that party's IXC, and the called party's LEC. Once the circuit is established, the communication follows a fixed course, and service disruptions can generally be associated easily with a particular provider and a particular component of the network.

In the Internet context, none of these premises hold. Outages experienced by the end user might stem from numerous causes, including not only failure of the broadband service provider's

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[41] *See supra* note 24.

[42] Here, again, several commenters support such requirements. *See, e.g.*, NASUCA Comments at 32-36; National Consumer Law Center Comments at 9; AARP Comments at 2; PUCO Comments at 10-13; New Jersey Ratepayer Advocate Comments at 11. Aside from PUCO, however, none of these commenters can point to actual examples of bills so complicated as to justify the extension of broad regulation.

[43] NCTA Comments at 11.

network, but failure in the backbone, failure in network of the Internet Service Provider ("ISP") serving an applications provider (*e.g.*, the ISP serving an online retailer or web-based e-mail provider with which the user seeks to interact), or even failure of a router system used to distribute content within a home or office after that content has been successfully delivered by the broadband network provider.[44] Backbone networks, of course, routinely exchange traffic with *other* backbones,[45] further complicating the identification of failure points. And all of this is to say nothing of the nature of packet routing, pursuant to which a given communication can – and often will – involve the use of numerous routes.[46] As Qwest explains: "While this makes for an effective communications technology, it also makes it difficult or impossible for network operators to ascertain when such problems may have occurred or to begin to determine the number of users impacted."[47]

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[44] *See generally* Qwest Comments at 6.

[45] These providers typically enter into "peering" arrangements (in which the two providers exchange traffic without billing one another) or "transiting" arrangements (in which one (usually smaller) provider will pay the other (usually larger) provider) in order to exchange traffic, expanding the reach of both networks. *See generally SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183, at ¶ 110 (rel. Nov. 17, 2005).

[46] NASUCA contends that network outage reporting would be feasible in the Internet access context because they were feasible in the context of DS3-capacity transmission facilities. NASUCA Comments at 39. This claim misses the central distinction between point-to-point communications, such as those conducted along an ordinary DS3 link, and packet-based Internet communications, whose path is never predetermined.

[47] Qwest Comments at 6. Perhaps for these reasons, the Commission in 2004 expressly declined to extend outage reporting requirements to networks of the sort at issue here. Opening a proceeding that ultimately extended such requirements to satellite and wireless voice providers, the Commission explained that it was "not proposing, at this time, to adopt reporting requirements for public data networks," defined to mean networks that provide "data communications for a fee to one or more unaffiliated entities." *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Notice of Proposed Rulemaking, 19 FCC Rcd 3373, 3375-76 n.4 (2004). *See also New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 16830, 16833 n.2 (2004)
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Here too, though, it should be emphasized that the absence of a regulatory requirement will not result in frequent network outages. Rather, a provider will build reliable networks – and will ensure that other providers with which it exchanges traffic do the same – because the only alternative is the loss of its customers. As AT&T notes, "[i]n today's competitive broadband marketplace, providers already have strong incentives to maintain highly reliable, secure broadband networks as a basis to attract and retain customers."[48] Moreover, where excessive outages unduly impinge on consumer interests, those outages will be appropriate subjects for redress by the FTC or by state attorneys general operating under the auspices of unfair and deceptive trade practice acts, as described above. Thus, the Commission should reject calls for an extension of outage reporting requirements.

E. Section 214-Style Discontinuance Limitations Should Not Be Extended To Broadband Internet Access Services.

It is also clear, as the Commission itself has recognized, that Section 214 discontinuance requirements are inappropriate in the competitive broadband Internet access market. Customers facing termination of service will very likely be able to obtain service from an alternative broadband provider, rendering an extensive regulatory regime unnecessary.

In the *Wireline Broadband Order*, the Commission noted that:

> The reasons that persuade us not to require that the transmission component of wireline broadband Internet access service continue to be offered as a telecommunications service under Title II also persuade us that discontinuance of the provision of common carrier broadband Internet access transmission services to existing customers would not adversely affect the present or future public convenience or necessity. Instead, competition from

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(reaffirming exclusion of public data networks); *id.* at 16891 ("[W]e are not addressing VoIP or public data network outage reporting at this time."); NCTA Comments at 7-11.

[48] AT&T Comments at 19.

> other broadband Internet access service providers and the wireline providers' business incentives to attract ISP customers should ensure the continued availability of this transmission component, under reasonable rates, terms, and conditions.[49]

Thus, the Commission granted facilities-based, wireline broadband Internet access transmission providers blanket certification to discontinue the provision of wireline broadband Internet access transmission services where those services had previously been offered on a common carriage basis, so long as they (1) provided customers with advance notification of the impending discontinuance and (2) informed the Commission of their intent to discontinue service at least 30 days prior to discontinuance.[50]

WCA agrees with commenters who oppose the imposition of Section 214 discontinuance requirements on broadband Internet access services.[51] No commenter has provided any reason to doubt the Commission's conclusion that competition in the broadband Internet access market renders such requirements unnecessary. And as several note, such requirements might well introduce significant costs. "Customers of a discontinuing provider almost invariably may purchase service from an alternative broadband service provider, and imposing exit barriers in such a marketplace does little more than pointlessly introduce inefficiencies."[52]

For these reasons, the Commission should decline to further extend Section 214 discontinuance requirements into the broadband Internet access market.[53]

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[49] *Wireline Broadband Order*, 20 FCC Rcd at 14907.

[50] *Id.* at 14908.

[51] *See, e.g.*, BellSouth Comments at 22-23 ("In the broadband market, in which customers have a choice of providers, Section 214-type notification requirements do not appear warranted at this time.").

[52] Time Warner Comments at 11; *see also* BellSouth Comments at 22-23.

[53] NARUC and PUCO support imposition of discontinuance requirements, but limit their comments on this point to VoIP-based telephony services. As noted above, *see supra* note 34, the application of such
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F. Section 254(g) Rate Averaging Requirements Are Inapplicable To Broadband Internet Access Services.

Finally, WCA strongly agrees with the great majority of commenters who dispute the need for rate averaging in the context of broadband Internet access services. Having rejected extensive economic regulation of this vibrant and competitive market, the Commission should not reverse course and simply apply another type of economic regulation[54] – especially one with potentially disastrous consequences for the deployment of service to urban and rural areas alike. The Commission has previously concluded that "economic regulation of information services would disserve the public interest because these services lacked the monopoly characteristics that led to such regulation of common carrier services historically."[55] This principle applies with special force here. As Verizon argues:

> The main point of classifying broadband Internet access services and the stand-alone broadband transmission used to provide them under Title I was to eliminate precisely this kind of market-distorting, investment-dampening economic regulation.… There is no policy reason for the Commission to take the radical step of imposing rate-averaging requirements on any information service, including broadband Internet access service, now. Competition for customers, including rural customers, is increasing. In this competitive environment, price regulation of the kind contemplated here would only serve to burden providers and harm the functioning of the free market.[56]

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requirements in that context is under consideration in the Commission's *IP-Enabled Services* proceeding, not this proceeding. The New Jersey Ratepayer Advocate seeks requirements with regard to broadband Internet access, but focuses its attention on the need for notice, declining to propose extensive section 214-like review of discontinuance requests in the broadband market. *See* New Jersey Ratepayer Advocate Comments at 13.

[54] *See, e.g.*, Time Warner Comments at 12 ("Rate regulation is perhaps the most intrusive and market-distorting form of economic regulation that the Commission has rightly sought to avoid with respect to broadband services."); USTA Comments at 8 ("Rate averaging is merely another form of rate regulation and as such is wholly inconsistent with Title I treatment of a service.").

[55] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22416-17 (2004).

[56] Verizon Comments at 23.

The Commission's own statements, and those of other commenters, confirm that providers are making great strides in bringing broadband services to rural America. In 2004's *Fourth Section 706 Report*, the Commission cited the "significant efforts made by rural telephone companies, cable television providers, and wireless providers to make advanced telecommunications facilities available in rural areas."[57] As a result of these efforts, "rural and low-income areas have experienced dramatic gains in broadband availability."[58] More recently, the Commission has reported that even areas with the very lowest population densities are generally served by at least one high-speed service provider.[59] The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") observes that "[w]hereas rural telephone companies typically serve as the only provider of wireline voice services in their territories, these carriers often face considerable competition in the market for broadband Internet access services." OPASTCO cites a 2004 member survey indicating that even then, over 75 percent of members that offered broadband service faced competition from at least one alternative provider of such service.[60] Advances in terrestrial wireless and satellite technologies, as well as increased investment by wireline providers in fiber-optic facilities, promise to further propel rural deployment.

A rate averaging requirement could have only one result in this market: an inhibition on further investment and deployment of service in *all* areas. Providers make their investment

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[57] FCC, Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, FCC 04-208, at 9 (2004).

[58] *Id.* at 10; *see generally id.* at 30-32 (describing broadband deployment to rural communities).

[59] *See* FCC, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of December 31, 2004*, at 24, Table 14 (rel. July 2005). *See generally* Verizon Comments at 24.

decisions on the basis of expected returns. "To the extent that providers encounter different cost structures to serve different areas, any requirement that would prevent providers from recognizing these different costs in the rates that they charge would simply create a disincentive to deploy services in high cost areas."[61] Indeed, rate averaging requirements would potentially introduce extensive cross-subsidies into the broadband marketplace. While such cross-subsidies have historically been deemed necessary to advance particular goals relating to the analog narrowband network, the Commission has recognized that they are inimical to the promotion of efficient investment, and are thus inappropriate in the context of a well functioning market.[62] The Commission should reject any appeals for the reintroduction of such subsidies here.

III. CONCLUSION

For the reasons stated above, WCA respectfully asks the Commission to refrain from imposing burdensome regulations on the provision of broadband Internet access services. No party has submitted evidence of any harm arising from the absence of widespread consumer protection regulation in the broadband market. This is no coincidence: The market for these services is competitive, and that competition – in conjunction with generally applicable federal

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[60] OPASTCO Comments at 2-3.

[61] BellSouth Comments at 23. *See also* Time Warner Comments at 12 ("Rate averaging requirements would necessarily undermine providers' ability to respond to competition. Thus, rather than promoting affordable rates for consumers living in rural areas, rate averaging requirements might well stymie consumer-friendly promotions and delay price reductions in many areas.").

[62] *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4689 n.20 (2005) ("The 1996 Act recognized … that … implicit subsidies could not continue in a competitive marketplace and directed the Commission to create explicit universal service support mechanisms that are specific, predictable and sufficient."); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11572 (1998) ("The 1996 Act makes a decisive break from the existing practice of implicit universal service subsidy structures. Rather than preserve the inefficient mechanisms designed for an

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and state consumer protection mechanisms – will adequately ensure consumers' interests without the market-distorting effects that too often accompany regulation.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, INC.

By: /s/ Andrew Kreig
Andrew Kreig
President

1333 H Street, NW
Suite 700 West
Washington, DC 20005
(202) 452-7823

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industry characterized by local monopolies, the 1996 Act directs the Commission to make universal service funding explicit and competitively-neutral."). *See also* Time Warner Comments at 13.